IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 721 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JASVANTRAI HARGOVINDRAI RAVAL
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 721 of 1997
MS BANNA S DUTTA for Appellant
MR UR BHATT, APP for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 19/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the

Code of Criminal Procedure, 1973 ("the Code" for short) is directed against judgment dated July 1, 1997 rendered by the learned Additional Sessions Judge, Surendranagar, in Sessions Case No.63 of 1995 by which the appellant is convicted of the offences punishable under Section 302 of Indian Penal Code ("IPC" for short) as well as Section 135 of the Bombay Police Act, 1951, and sentenced to suffer R.I. for life and fine of Rs.100=00, in default of R.I. for one month. The learned Judge has not imposed any punishment on the appellant for commission of offence punishable under Section 135 of the Bombay Police Act.

2. Deceased, Bhupatbhai Hargovindbhai Raval, was residing near Old Post Office of village Kondh, Taluka Dhrangadhra, District Surendranagar. Name of his wife is Neelamben. During the subsistence of marriage with deceased, Neelamben had given birth to three children. The eldest was Himalay @ Hemang and was aged about nine years at the time when the incident had taken place. The deceased was doing business of officiating at the performance of ceremonies at a Patron's house and was maintaining his family from the alms and gifts received from the patron's house. The appellant is the real brother of the deceased. It may be stated that the appellant was eldest amongst three brothers and was being addressed as "Dada" by Himalay @ Hemang, who was son of the deceased. The appellant was also doing business of officiating at the performance of ceremonies at a patron's house. The deceased had also another brother named Chandubhai whereas his parents, who were aged, were residing separately. The appellant had dispute with the deceased regarding business of officiating at the performance of ceremonies at a patron's house. The grievance of the appellant was that the deceased was doing business of officiating at the performance of ceremonies at his patron's house whereas the grievance of the deceased was that the appellant was doing business of officiating at the performance of ceremonies at his patron's house. The incident in question had taken place on June 30, 1995. The deceased had left his house at abut 9.00 a.m. for doing his business and at that time, his wife was in his house whereas his son Himalay was playing outside the house. At about 11.00 a.m., Himalay had come rushing to his house and informed Neelamben by shouting that dada was beating his father. On hearing shouts of her son, Neelamben immediately went to the place situated near telephone office and found that the deceased had fallen down on the ground and that the appellant was causing injuries on his head by means of a spade. Therefore, Neelamben had raised shouts and

hearing the same, one Lakhubha had come on site. On seeing Neelamben, the appellant had run away from the place of incident with spade. Injuries sustained by the deceased were so serious that there was profuse bleeding and he had died on the spot. Parakramsinh Vijaysinh, who was then Sarpanch of Kondh Gram Panchayat, had also come at the place of the incident and he had informed Dhrangadhra Taluka Police Station on telephone that the deceased was murdered. The message was received by Ranchhodbhai Parmar, who was then PSO of Dhrangadhra Taluka Police Station. Mr.Parmar had made necessary entry in Police Station Diary and flashed message on wireless to Mr.H.V.Shrimali, who was then PSI of Dhrangadhra Taluka Police Station that the deceased was murdered. It may be stated that at that time PSI Mr.Shrimali was on patrolling duty and on receipt of wireless message, had immediately returned to Police Station. After verifying the entry, PSI Mr.Shrimali had gone to Kondh village and found that the dead body of deceased Bhupatbhai was lying on road near telephone office. Neelamben, who is wife of the deceased, was found present at the place of incident. Therefore, First Information Report as narrated by her was taken down by PSI Mr.Shrimali. PSI Mr.Shrimali had made necessary arrangements for sending First Information Report to Police Station for registration of the offences, etc. He had also held inquest on the dead body of the deceased in the presence of panch witnesses and drawn panchnama of place of incident. He had recorded statement of Himalay @ Hemang and other persons who were found to be conversant with the facts of the case. Mr.Shrimali had made inquiry about the appellant, but the appellant was not found at his house. Necessary arrangement was made for sending the dead body of the deceased to Dhrangadhra Government Hospital for postmortem examination. At the hospital, autopsy on the dead body of the deceased was conducted by Dr.Pragnaben Vadodariya, who was then Medical Officer of the Hospital. The clothes of the deceased were produced by PSO of the Police Station before the Investigating Officer, which were taken into custody under a panchnama. The appellant had surrendered to the police on July 3, 1995, and at that time, panchnama of his person was prepared. White open shirt put on by the appellant was found to be bloodstained and, therefore, the same was seized during the course of investigation. While in police custody, the appellant had made disclosure statement pursuant to which, spade used in commission of crime was discovered by the Investigating Officer in presence of panch witnesses. Incriminating articles which were seized during the course of investigation were sent to Forensic Science

Laboratory for analysis. On completion of investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate First Class at Dhrangadhra of the offences punishable under Section 302 IPC and Section 135 of the Bombay Police Act, 1951. As the offence punishable under Section 302 IPC is exclusively triable by a Court of Sessions, the case against the appellant was committed to the Sessions Court, Surendranagar, for trial where it was numbered as Sessions Case No.63 of 1995.

3. The learned Additional Sessions Judge to whom the case was made over for trial, framed charge against the appellant at Exh.3 of the offences punishable under Section 302 IPC and Section 135 of the Bombay Police Act, 1951. The charge was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Dr.Pragnaben Harin Vadodariya as P.W.-1 at Exh.12; (2) Neelamben Bhupatray as P.W.-2 at Exh.16; (3) Hemang Bhupatray as P.W.-3 at Exh.18; (4) Lakhubha Ramubha as P.W.-4 at Exh.19; (5) Ushaben Chandubhai as P.W.-5 at Exh.20; (6) Hasmukhray Girdharlal Bhatt as P.W.-6 at Exh.22; (7) Dajibhai Hemubhai as P.W.-7 at Exh.27; (8) Shaktisinh Natubha as P.W.-8 at Exh.28; (9) Baldev Chandubhai as P.W.-9 at Exh.29; (10) Natubha Takhubha as P.W.-10 at Exh.30; (11) Adam Abdulbhai as P.W.-11 at Exh.31; (12) Parakramsinh Vijaysinh as P.W.-12 at Exh.37; and, (13) Haribhai Vasrambhai Shrimali as P.W.-13 at Exh.38 to prove its case against the appellant. The prosecution also produced documentary evidence such as postmortem notes of the deceased at Exh.15; complaint lodged by Neelamben Bhupatbhai at Exh.17; map of place of incident at Exh.24; inquest panchnama at Exh.25; panchnama of person of the appellant prepared at the time of his arrest at Exh.26; Notification issued by the competent authority under Section 37(1) of the Bombay Police Act at Exh.32; copy of the gazette in which the said Notification was published at Exh.33; panhnama of place of incident at Exh.39; panchnama relating to seizure of clothes of the deceased at Exh.40; panchnama indicating discovery of iron spade pursuant to disclosure statement made by the appellant at Exh.42; report of analysis issued by the competent authority of Forensic Science Laboratory at Exh.44, etc. in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses, and recorded his

further statement as required by Section 313 of the Code. In his further statement, it was claimed by the appellant that he was staying separate whereas his parents, the deceased and his brother Chandubhai were staying together. It was also mentioned by the appellant in his statement that Himalay was knowing him and addressing him as "Bhaiji". The last question which was put by the learned Judge of the trial Court to the appellant was whether the appellant was inclined to examine any defence witness and in reply to the said question, the appellant stated that the competent person from Dhrangadhra Taluka Police Station should be called upon to produce copy of First Information Report lodged by him against the deceased, which was numbered as C.R.No.166 of 1994. At that time, the learned Additional Public Prosecutor declared before the Court that the prosecution was inclined to produce the same before the Court. Accordingly, a copy of C.R.No.166 of 1994 registered at the instance of the appellant against the deceased was produced at Exh.50 whereas medical papers indicating that the appellant had taken treatment in view of injuries sustained by him in the incident which had taken place on August 8, 1994, were produced at Exh.52. When further explanation of the appellant was sought by the learned Judge of the trial Court while recording his statement under Section 313 of the Code, it was claimed by the appellant that he had been on pilgrimage of Goddess and was not knowing about the incident at all. It may be stated that the appellant had neither examined himself on oath nor any witness in support of the defence pleaded by him in his further statement.

5. On evaluation of the evidence adduced by the prosecution, it was held by the learned Judge that it was proved beyond reasonable doubt that the deceased had died a homicidal death. It was found by the learned Judge that the sworn testimony of witness Neelamben as well as that of child witness Himalay @ Hemang was trustworthy as well as cogent and ample corroboration to their evidence was available from the record of the case and after placing reliance on their evidence, it was held by the learned Judge that the appellant was the person who had caused fatal injuries to the deceased. After noticing the evidence of Dr.Vadodariya, which indicated that the injuries sustained by the deceased were sufficient in ordinary course of nature to cause his death, the learned Judge concluded that the appellant was guilty of the offence punishable under Section 302 IPC. It was further found that the appellant had also committed breach of Notification issued under Section 37 of the Bombay Police Act and was, therefore, liable to be convicted of the

offence punishable under Section 135 of the Bombay Police Act. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Sections 302 IPC and Section 135 of the Bombay Police Act and imposed sentences referred to above by judgment dated July 1, 1997 giving rise to instant appeal.

6. Ms.Banna Dutta, learned counsel of the appellant, contended that witness, Neelamben Bhupatray, who is wife of the deceased had, in fact, not seen the blows of spade being inflicted by the appellant on the deceased at all and, therefore, the learned Judge of the trial Court was not justified in placing reliance on the testimony of Neelamben while deciding the guilt or otherwise of the appellant. It was argued that testimony of Neelamben would show that she had come to the place of incident after the incident was over and, therefore, her testimony was of no assistance to the prosecution in proving charge levelled against the appellant. According to the learned counsel of the appellant, testimony of child witness, Hemang Bhupatray, was also not reliable because his testimony was not recorded on oath as he was not able to understand sanctity of the same and, therefore, the same should have been discarded while determining the question whether the appellant had caused murder of the deceased or not. What was maintained by the learned counsel of the appellant was that the testimony of child witness also shows that it was tutored one and, therefore, should have been discarded from the consideration. The learned counsel of the appellant emphasised that find of blood having same blood group as that of the deceased on white open shirt of the appellant should not have been relied upon by the learned Judge of the trial Court more particularly when requirements of Section 27 of the Indian Evidence Act were not satisfied. According to the learned counsel of the appellant, the prosecution has failed to establish its case against the appellant beyond reasonable doubt and, therefore, the appeal should be accepted.

7. Mr.U.R.Bhatt, learned Additional Public Prosecutor, contended that testimony of Neelamben clinchingly establishes that she had, in fact, seen that the appellant had caused injuries on the head of the deceased and, therefore, the learned Judge of trial Court, who had advantage of observing demeanour of witnesses, was justified in relying upon her testimony while considering the question whether charge against the appellant was proved or not. It was argued that testimony of Neelamben stands completely corroborated by her complaint and also by reliable testimony of child

witness, Hemang Bhupatray, as well as that of Ushaben Chandubhai and, therefore, conviction of the appellant under section 302 IPC should not be regarded as erroneous. What was maintained before the Court was that the testimony of child witness Hemang does not show that he was either tutored or was not able to understand seriousness of the offence and/or consequences of his deposition before the Court and, therefore, the plea that evidence of child witness, Hemang, should be discarded from the consideration, should not be accepted by this Court. It was argued that find of blood having same group as that of the deceased on white open shirt put on by the appellant establishes that the appellant was in close proximity of the deceased when the deceased was fatally wounded and as this circumstance corroborates the testimony of two eye witnesses, well founded conviction of the appellant under Section 302 IPC should be upheld by this Court. According to the learned Additional Public Prosecutor, no effort was made by the appellant to even probablise his defence of alibi which was pleaded in his further statement, which is a circumstance against the appellant and having regard to the facts of the case, the appeal, which lacks merits, should be dismissed.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. The fact that the deceased had died a homicidal death is hardly in dispute. According to Neelamben, who is wife of the deceased, and Hemang, who is son of the deceased, the deceased had received injuries by means of a spade and those injuries were inflicted by the appellant. Injuries sustained by the deceased are also mentioned in inquest panchnama which is produced on record of the case at Exh.25. The testimony of Dr.Pragnaben Vadodariya, recorded at Exh.12, would show that she was Medical Officer of Dhrangadhra Government Hospital and had received dead body of the deceased on June 30, 1995 for postmortem examination. The external injuries as well as the internal injuries, which were noticed by her while performing autopsy on the dead body of the deceased, have been enumerated by her in her substantive evidence before the Court. Those injuries are also mentioned in detail in Column Nos.17, 19 and 20 of the postmortem notes produced on record of the case at Exh.15. It is nobody's case that the deceased had received those injuries in an accident or that those injuries were self-inflicted. Under the circumstances, the finding recorded by the learned Judge of the trial

Court that the prosecution has proved beyond reasonable doubt that the deceased had died a homicidal death, is eminently just, and is hereby upheld.

10. In order to prove the charge levelled against the appellant, the prosecution has examined two witnesses. They are (1) Neelamben, who is wife of the deceased, and (2) Himalay @ Hemang, who is son of the deceased.

11. The testimony of Neelamben, which is recorded at Exh.16, would show that she was residing with the deceased and her three children near the old Post Office situated in village Kondh. According to her, house of the younger brother of her husband was situated near her house. What is mentioned by the witness is that at about 9.00 a.m. on the day of the incident, the deceased had gone to do the business of officiating at the performance of ceremony at his patron's house and she was present in her house. It is assertively stated by the witness that at about 11.00 a.m. on the day of the incident, her son Himalay had come to her house and shouted loudly that dada was beating his father. What is mentioned by this witness is that thereupon, she had immediately gone to the place of the incident and found that her husband had fallen down on the ground and that the appellant was inflicting blows with the spade on the head of the deceased. It was also maintained by the witness before the Court that she had raised shouts as a result of which, Lakhubha had come at the place of the incident. According to her, on seeing her, the appellant had run away from the place of the incident with the spade. It is also mentioned by her that blood was oozing out from ear of her husband and her husband had died on the spot. While mentioning the motive, which had prompted the appellant to assault the deceased, it was stated by her that dispute as to who was entitled to do the business of officiating at the performance of ceremony at the house of a particular patron was going on between the appellant and the deceased and due to that dispute, the appellant had assaulted the deceased. According to her, she had lodged First Information Report at the place of the incident itself.

In her cross-examination, it was mentioned by the witness that in her family no body was pursuing profession of agriculture. It was also mentioned by the witness that her father-in-law and mother-in-law were staying separate and that all brothers were also staying separate, but in the same mohalla. The cross-examiner had tried to know from the witness as to whether she was knowing that the deceased had injured the appellant with

iron shod stick, but the witness had pleaded ignorance. The suggestion put to the witness that because of assault mounted by the deceased earlier on the appellant, the appellant had sustained fracture on hand as a result of which the appellant was not able to pick up anything in his hand because a plate was inserted in his hand, was emphatically denied by her. According to this witness, her son Hemang was studying in the school situated in village Malvan before the incident had taken place, but he was present in her house as he was ill at that time. It was admitted by her that houses of several persons were situated near the place of the incident, but it was maintained by her that no one else had informed her about the incident. According to her, his deceased husband was assaulted near the telephone office. It was explained by the witness that on hearing shouts of her son Hemang, she alone had gone to the place of incident and had not taken any one else with her. In cross-examination also, it was maintained by the witness that when she had gone at the place of incident, there was no one else except her husband and the appellant. According to her, as soon as she had realised that her husband had died, she had gone to the Police chawki to lodge the complaint, but as no policeman was present at the police chawki, no complaint was lodged at police chawki. Further, it was stated by her in cross-examination that Parakramsinh had informed the police on phone and, therefore, the police had come at the place of the incident. It was also stated by her that at the time of the incident, wife of younger brother of her deceased husband as well as her father-in-law and mother-in-law were present and that she had informed her father-in-law that father of Hemang was murdered. It was also admitted by her that when her complaint was being reduced into writing, Sarpanch of the village was present. It was mentioned by the witness that the appellant had run away in another direction, but she had not informed any one that the appellant had run away in the said direction. The suggestion put by the defence that her father-in-law and three brothers were having 375 vighas of land was denied by her. According to her, the appellant was also doing the business of officiating at the performance of ceremony at a patron's house and was father of four daughters and three sons. What was stated by the witness in her cross-examination was that earlier, the appellant had caused injuries to her husband, but her husband had not filed any complaint against the appellant because the dispute was resolved through Parakramsinh. It was further clarified by her that when Hemang had informed her that the appellant was beating his father, at that time, she was washing clothes in fali of her house. It was also mentioned by the witness that she had

not asked any one to chase the appellant who had run away, to apprehend him. What was maintained by the witness before the Court was that when she had gone to the Police Chawki to lodge First Information Report, she was not accompanied by any one. It was also stated by her that she was not knowing as to from where Parakramsinh had made telephone call and informed the police about murder of the deceased. The witness had informed the Court that panchnama of place of occurrence was prepared at about 12.30 noon. In answer to the question as to at what time police statement of her son Hemang was recorded, it was replied by the witness that she was not remembering the time.

This is all what transpires from the testimony of Neelamben. A bare perusal of her testimony makes it evident that she had seen the incident in question and had not learnt about the same after it was over. Her testimony shows that when she had gone at the place of incident, her husband was lying on the ground whereas the appellant was inflicting blows on the head of the deceased. It is well to remember that she is wife of the deceased. Under the circumstances, she would never allow the real culprit to go scot-free and involve the appellant, who is real elder brother of her husband falsely in such a serious case. No major contradictions or omissions could be brought on record by the defence. A fair reading of her testimony makes it clear that she had deposed before the Court in straight manner and has stated the incident as she had seen it. As her testimony does not suffer from any serious infirmity, the learned Judge of the trial Court, who had advantage of observing demeanour of the witnesses, was justified in placing reliance on her testimony. On reassessment of her testimony, this Court finds that her testimony is not only trustworthy, but cogent. Witness Neelamben gets ample corroboration from her complaint, which was lodged immediately as soon as the police had arrived at the scene of offence. Further, her testimony also gets support from testimony of a child witness, Himalay Hemang Bhupatbhai and also from medical evidence regarding injuries sustained by the deceased. The testimony of this witness is of such a sterling quality that the conviction of the appellant under Section 302 IPC merits confirmation on the basis of her testimony alone.

12. In order to prove charge against the appellant, the prosecution also relies on testimony of child witness Hemang Bhupatray. Before discussing his evidence, it would be advantageous to refer to the law relating to

child witness. Section 118 of the Evidence Act deals with the question of competency of persons to testify. Under this Section, all persons are competent to testify, unless they are, in the opinion of the Court, (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender years, (ii) extreme old age, (iii)_ disease of mind or body, or (iv) any other such cause. Even a lunatic, if he is capable of understanding the questions put to him and giving rational answers, is a competent witness. With respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. A child is not an incompetent witness by reason of his age. A child of tender years is not, by reason of his youth, as a matter of law, disqualified as a witness. There is no precise age which determines the question of competency. According to Section 118 of the Evidence Act, a child of tender age is a competent witness if it appears that it can understand the questions put to it and give rational answers thereto. This section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. When a young child is a witness, the first step for the Judge or Magistrate to take is to satisfy himself that the child is the competent witness within the meaning of Section 118 of the Evidence Act and for this purpose, preliminary inquiry should be held. It is the duty of the Court to ascertain in the best way, which it can, whether from the extent of his intellectual capacity and understanding the child witness is able to give a rational account of what he has seen, heard or done at a particular occasion or in other words, the witness understands the duty of speaking truth or not. Competency of young children can be ascertained by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the Court thereof. The holding of a preliminary inquiry is merely a rule of prudence and is not a legal obligation upon the Judge. It is desirable that after holding a preliminary inquiry, Judges and Magistrates maintain record incorporating opinion that the child understands the duty of speaking truth. However, absence of recording of such an opinion does not make evidence of a child witness inadmissible. Opinion of the Court in this behalf can be gathered by the appellant Court from circumstances appearing in the case if there is no certificate by the learned Trial Judge. Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one

broad test is whether there was possibility of any tutoring. If this test is found in the positive, the Court will not , as a rule of prudence, convict the accused on a murder charge on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime. At the same time, if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities, it calls for due credence. A child in the innocent purity of its mind and unsophistication is more likely to come forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulation, motivation and spirit of vendetta. It can as well be spontaneous and inspiring, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion and given confidence to come out with what was seen. Further, some of the children are fairly intelligent, truthful and straight forward, and there is no reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. In the case of Mohamed Sugal Esa Mamasan Rer Alalah vs. The King, A.I.R. 1946 Privy Council, 3, it is held as under:-

> "In England, where provision has been made for the reception of unsworn evidence from a child, it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But, in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

13. Having noticed the law relating to child witness, this Court proposes to discuss the evidence of child witness, Hemang. His testimony would show that at the time of recording of his deposition, he was aged 11 years and was prosecuting studies. In order to satisfy whether witness was understanding seriousness of the case and the duty of speaking truth before the Court, certain preliminary questions were put to him by the learned Judge. First question, which was asked by the learned

Judge, was as to he was studying in which standard and where, and in reply to the said question, it was stated by the witness that he had completed his studies upto 7th standard and was studying at Malvan. The learned Judge had tried to know from him as to where he had come and for what purpose. In answer to this question, it was replied by the witness that he was present in the courtroom because the case was listed for hearing. It was further stated by the witness that the case was relating to his father. In question to answer, as what he was supposed to do, it was replied that he was to give answers to the questions put to him by the learned Judge. The learned Judge of the trial Court had asked as to what would happen if false answers were given and in reply thereto, it was stated by the child witness that giving of false answers would invite punishment whereas nothing would happen if the truth was told. A fair reading of the questions put by the learned Judge to the child witness and replies given by the child witness would indicate that child witness was able to understand the questions put to him as well as give rational answers to those questions and was aware about his duty to speak truth. In spite of this, the learned Judge had heard the learned counsels of the parties as to whether the deposition of the child witness should be recorded on oath or not and without expressing any opinion that the child witness was not able to understand the questions put to him or give rational answers to those questions owing to tender age, the learned Judge had decided not to record testimony of this witness on oath. This Court feels that such an approach by the learned Judge was not warranted at all. As the answers given to questions were rational and as the child witness was able to understand the gravity of the case, his testimony should have been recorded on oath. Be that as it may, his testimony shows that he had two other brothers and that he was the eldest. According to him, the name of his one brother was Prashant whereas that of another was Ajay and that both of them were prosecuting studies. The witness stated before the Court that name of his mother was Neelamben whereas the name of his father was Bhupatray Raval. He had identified the appellant who was siting in the courtroom and stated before the Court that he was his dada and his name was Jashwantray. It was also stated by the witness that the appellant was elder brother of his father and, therefore, he was addressing the appellant as dada. According to this witness, his father was doing the business of officiating at the performance of ceremonies at a patron's house and that the incident had taken place on 30th before 11/2 to 2 years of recording of his deposition. It was maintained by the witness that

on the date of the incident, he was playing outside his house and that about about 11.00 a.m., he had seen that his dada was beating his father with a spade. According to him, he was scared and, therefore, had gone to call his mother. It was also mentioned by the witness that when he had gone to his house, his mother was washing clothes in fali of the house and he had informed his mother that dada was beating his father. It was also stated by the witness that as he was scared, he was not knowing as to what had happened thereafter. It was further mentioned by the witness that as soon as information was conveyed by him to his mother that his father was being assaulted, his mother had come out of the house and gone to the place where the deceased was being assaulted. According to him, his father was murdered.

In his cross-examination, it was stated by him that while prosecuting studies at Malvan, he was staying at the house of his maternal uncle. It was admitted by him that in his maholla, there were residential houses of others, but it was stated by him that no other boys were playing with him. According to him, on the day of incident, he was present in village Kondh and not in village Malvan, and he had not met boys of village Kondh residing near his house. According to him, after informing his mother about assault on his father, he had confined himself in the house and was weeping. In cross-examination, it was stated by the witness that he was playing at a distance of 25 to 30 ft. away from his house whereas shop of Lakhubha was situated at a distance of five to seven feet from the place of the incident. According to him, on the day of incident, telephone office was closed whereas doors of houses situated nearby were also closed. It was mentioned by him that his uncle and father of his father were residing near his house. He had pleaded ignorance as to whether any case was pending against his father, but it was mentioned that after the incident was over, he had learnt that earlier his father had assaulted the appellant with an iron shod stick. It was maintained by the witness that he had stated in his police statement that his father had received injuries on head by means of a spade. According to him, he was playing game of hitting the ball on a wall and catching the same when it was rebounding. It was also admitted by him that he had no talk with the boys residing in his neighbourhood about the incident. According to him, the fact that he was present at the time when the incident had taken place, was known only to his mother and to no one else. It was also stated by him that he was not knowing as to why the quarrel had taken

place. The suggestion made by the defence that he was not present at village Kondh was emphatically denied by him. Similarly, it was also emphatically denied by him that he was falsely got up as a witness because his name was mentioned by his mother in her complaint.

Reassessment of evidence of this child witness also shows that he has deposed before the Court in a most natural manner. He has not exaggerated the incident at all nor made any embellishment. It could not be successfully demonstrated by defence that he was tutored. His testimony does not suffer from serious infirmities. The defence could not bring on record any major contradictions and/or omissions with reference to his earlier police statement. The testimony of this witness gets complete corroboration from the reliable testimony of his mother Neelamben. The fact that this child witness had seen the incident is also mentioned in the complaint of Neelamben which is produced on record of the case at Exh.17.

14. Further, testimony of witness Ushaben Chandubhai, recorded at Exh.20, shows that this child witness had shouted at his mother that his father was being beaten by dada and, therefore, the complainant should go there. It may be stated that witness Ushaben is wife of Chandubhai, who is brother of the deceased as well as the appellant. Though she has said that on hearing shouts of child witness Hemang, she had come out of her house, she has not stated that she herself had seen the appellant inflicting blows on the deceased. Thus, this witness has given deposition in a most straightforward manner. During her searching cross-examination, nothing could be brought on record, which would make a dent in her assertion that child witness had informed his mother that the appellant was assaulting his father. Under the circumstances, there is no manner of doubt that the child witness also stands corroborated by testimony of witness Ushaben. Thus, testimony of child witness also establishes that the appellant was the author of the injuries sustained by the deceased.

15. The discussion of evidence tendered by the abovenamed witnesses establishes beyond reasonable doubt that on the day of incident, the appellant had assaulted the deceased with a spade and caused injury, which was ultimately noticed by the Medical Officer when autopsy on the dead body of the deceased was performed. The prosecution has also been successful in proving that the motive, which had prompted the appellant to assault the deceased, was dispute regarding business of officiating

performance at the ceremonies at a patron's house.

16. The plea that the appellant had sustained fracture as a result of which plate was inserted in his hand and, therefore, was not able to pick up spade or hit the deceased cannot be accepted in view of overwhelming and trustworthy evidence of eye witnesses to the effect that the appellant had inflicted blows with a spade on head of the deceased. No evidence could be led by the appellant to even remotely suggest that he was not able to pick up a spade because of injuries which were sustained by him earlier on his hand. Further, it is well to remember that the two eye witnesses are closely related to the deceased as well as the appellant and nothing could be brought on record, which would suggest that either witness Neelamben or witness Hemang was on inimical terms with the appellant. Therefore, their evidence merits acceptance. The little boy was loving the appellant so much that he was addressing the appellant as his dada. He had no reason to involve the appellant falsely in such a serious case. His evidence read with that of Neelamben fully establishes that on the day of incident, the appellant had inflicted serious injuries on the head of the deceased by means of a spade.

17. The testimony of Dr.Prangaben, who had performed postmortem on the dead body of the deceased, shows that the deceased had sustained serious injuries on his head and because of head injuries sustained by the deceased, fracture of skull over upper occipital region had taken place. Further, brain matter was seen protruding out from fractured skull above left ear. It was also found that there was cut over brain 2 cms. x 1 cm. over left parietal lobe. Having regard to the nature of injuries sustained by the deceased, there is no manner of doubt that they were sufficient in ordinary course of nature to cause death of the deceased. In fact, reliable testimony of eye witnesses shows that the deceased had died on the spot within no time. On the facts and in the circumstances of the case, therefore, it will have to be held that the case is governed by Clause thirdly of Section 300 IPC, and the appellant is rightly convicted under section 302 IPC.

18. There is yet another circumstance on record which deserves a special mention. The reliable testimony of the Investigating Officer shows that the appellant was arrested on July 3, 1995 when he had surrendered at Kondh Outpost and at the time of his arrest, white open shirt put on by him was found to be bloodstained. His evidence further proves that, therefore, white open shirt put on

by the appellant at the time of his arrest was seized and was sent to Forensic Science Laboratory for analysis. The report of analysis is produced by the prosecution at Exh.44. It shows that blood group of the deceased was A(A) and group of blood found on open shirt, which was put on by the appellant, was A(A). The find of same group of blood as that of the deceased would establish that at the time of the incident, the appellant was in close proximity of the deceased and had every opportunity to commit crime in question.

19. At this stage, it would be relevant to notice that the defence of the appellant in his further statement was that on the day of incident, he was on pilgrimage of Goddess and was not knowing anything about the incident. In view of the provisions of Section 103 of the Indian Evidence Act, there is no manner of doubt that when the accused pleads alibi, burden is on him to prove it. The plea of alibi postulates physical impossibility of presence of an accused at the scene of offence by reason of his presence at another place. The plea can, therefore, succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where crime was committed. This Court finds that even a feeble attempt was not made by the appellant to probablise his plea of alibi. Thus, there is no manner of doubt that a false defence was pleaded to misguide the Court. Even otherwise, reliable testimony of two eye witnesses establishes that the appellant was physically present in village Kondh at the time and place of the incident and had fatally wounded the deceased. Therefore, the plea of alibi does not help the appellant at all.

20. Having regard to the totality of the facts and circumstances of the case, there is no manner of doubt that the prosecution has successfully established that the appellant had caused death of the deceased on June 30, 1995 by inflicting injuries with a spade, and that his conviction under Section 302 IPC is well founded. The appeal, therefore, which lacks merits, is liable to be dismissed.

21. For the foregoing reasons, the appeal fails, and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J.)

(J.R. Vora, J.)

Rajendra